

OGC 73-0809

9 May 1973

MEMORANDUM FOR: Deputy Chief, EA Support

SUBJECT: Breach in Domestic Relations Affecting
Separate Maintenance Allowance (SMA)

REFERENCE: Memo to OGC fr AC/Far East Support dtd
3 Mar 73, same subj

1. You have requested a review of the "marital breach" proviso within the separate maintenance allowance (SMA) regulation in light of the facts presented in referent memorandum. Those facts are essentially as follows.

2. An EA employee has been assigned to a post of duty where, "for the convenience of Headquarters (his) dependents may not accompany (him)." For purposes of receiving SMA he was asked to certify: "It is my desire and intention that my dependents accompany me to my post of assignment and that there are no personal factors which prevent them from doing so...." He has stated that "...he is willing to sign such certification with the condition that Headquarters understands that he and his wife are living apart by mutual consent with no intention of taking legal action to formalize this arrangement." STATINTL

3. Agency regulations on SMA, found at [REDACTED] refer to section 260, Standardized Regulations (Government Civilians,

Foreign Areas) wherein it is stated:

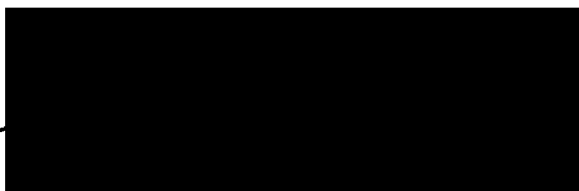
Separate maintenance allowances are intended to assist in offsetting the additional expenses incurred by an employee who is compelled by the circumstances described in section 262.1* to maintain a separate household for his family. 261. 2.

Under 262.3, "Conditions not Warranting a Separate Maintenance Allowance," it is stated that SMA "shall not be granted" where the separation is for personal reasons or where there has been a breach in domestic relations between employee and spouse.

4. The exact form of a "marital breach" has been the subject of discussion in the past. Some view it as occurring only if there has been a property settlement agreement, a legal separation or a divorce. Others have argued that the only reasonable test to be applied is the so-called "but for test." That is, but for the Agency's determination that dependents may not accompany an employee to his post of assignment, would they be there? If the answer is no, then the separation is for a reason not attributable to the Government and no SMA may be paid. The undersigned views the "but for test" as the most valid method of determining an employee's entitlement to SMA. It not only covers the five specific reasons set out in 262.31 but encompasses any "personal reason" for the family living separate and apart from the employee at his post of assignment. In addition, the language of the SMA is permissive in nature. "A separate maintenance may be granted to an employee whenever the head of agency determines that the employee is compelled to maintain any or all dependents... elsewhere than at his post of assignment...." Conversely, an entitlement to SMA could clearly be denied by the head of agency whenever he determines the compulsive aspect is absent.

*"Separate maintenance allowance" means an allowance to assist an employee who is compelled, by reason of dangerous, notably unhealthful, or excessively adverse living conditions at his post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining his dependents elsewhere than at such post. 261.1(a).

5. In the instant case I can find no compelling reason for the employee to maintain two households. By his own statement, personal reasons (a marital breach of some nature) underlie the fact that members of his family would not join him at his post of assignment if they could. Accordingly, application of the "but for test" results in a negative answer and any determination in favor of SMA for the employee would be subject to legal objection. STATINTL



Assistant General Counsel

GMB:ks

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cc: D/Finance
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89273.0375

3 March 1973

MEMORANDUM FOR: Office of General Counsel

ATTENTION :

SUBJECT : Breach in Domestic Relations Affecting
Separate Maintenance Allowance (SMA)

1. On 20 April 1972, an FE employee was transferred in

[REDACTED] (a [REDACTED] ue of [REDACTED]

On this transfer, the employee would have been entitled to have his wife in CONUS and draw 100% SMA or [REDACTED] in government-provided quarters at 50% SMA. The record shows, however, that subject's wife had been authorized advance return due to family problems in June 1970 and had not since then re-joined her husband at either overseas post. [REDACTED]

[REDACTED] accordingly, requested that subject employee be granted 100% separate maintenance allowance commencing 20 April 1972, the date of his transfer to the non-family post.

2. Headquarters answered the field by noting that subject is now on a new tour and that we needed certification from him to the effect "It is my desire and intention that my dependents accompany me to my post of assignment and that there are no personal factors which prevent them from doing so. I have been informed, however, that for the convenience of Headquarters my dependents may not accompany me to my post." This quotation is lifted from Form 614 which is the authorization for SMA and must be signed by the individual before an allowance will be granted by the Director of Personnel. Subject answered the query with the statement that he is willing to sign such a certification with the condition that Headquarters understands that he and his wife are living apart by mutual consent with no intention of taking legal action to formalize this arrangement.

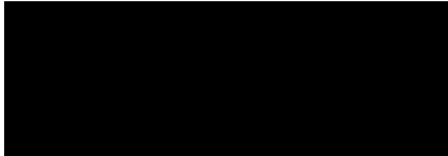
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We have been asked if this personal arrangement would preclude him from signing the agreement and not receiving the allowance. Standardized Regulation 262.3 specifically states that a "breach in domestic relations between employee and spouse" is a condition not warranting an SMA. The legal question here then is whether or not this "personal arrangement" is a breach in domestic relations as contemplated by the regulation. Your review of this question is solicited. For further information or discussion, please call the undersigned on R-9038.

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Acting Chief, Far East Support

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